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9 RICHARD STEELE,

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10 Plaintiff,

11 v.

12 JO ANNE B. BARNHART,
13 Commissioner of social
Security,

14 NO. CV-04-334-MWL

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Defendant.

15 BEFORE THE COURT are cross-Motions for Summary Judgment, noted
16 for hearing without oral argument on May 31, 2005. (Ct. Rec. 11,
17 15.) Attorney Lora Lee Stover represents plaintiff; Special
18 Assistant United States Attorney Leisa A. Wolfe represents
defendant. The parties have consented to proceed before a magistrate
19 judge. (Ct. Rec. 6.) After reviewing the administrative record and
20 the briefs filed by the parties, the court **GRANTS** Defendant's
21 Motion for Summary Judgment (Ct. Rec. 15) and **DENIES** Plaintiff's
22 Motion for Summary Judgment (Ct. Rec. 11).

23 Plaintiff applied for Social Security Income ("SSI") and
24 disability income benefits ("DIB") in April of 2002. (Tr. 75-77.)
25 Her claim was denied. After a hearing, Administrative Law Judge
26 (hereinafter, "ALJ,") Richard Hines denied benefits in a decision

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1 issued on January 20, 2004. (Tr. 21.) The Appeals Council denied
 2 review. The instant matter is before this court pursuant to 42
 3 U.S.C. § 405(g).

4 **ADMINISTRATIVE DECISION**

5 The ALJ found plaintiff had not engaged in substantial
 6 gainful activity after his alleged onset date of January 1, 2001.
 7 (Tr. 22.) The ALJ found that though plaintiff suffers from liver
 8 disease/hepatitis C and cutaneous porphyria tarda ("PCT" or "CPT")
 9 with left hand spasm/contracture, impairments that are severe, his
 10 impairments do not meet or medically equal the Listings. (Tr. 24.)
 11 The ALJ found that plaintiff retains the residual functional
 12 capacity for a significant range of light work, with several
 13 specified limitations. (Tr. 26.) The ALJ found that plaintiff is
 14 unable to perform his past relevant work. (Id.) Relying on the
 15 testimony of a vocational expert, the ALJ found that plaintiff
 16 could perform work that exists in significant numbers in the
 17 national economy, specifically, as an agricultural sorter, a
 18 cannery worker and a cafeteria worker. (Tr. 27.) The ALJ found
 19 Plaintiff was not disabled.

20 **STANDARD OF REVIEW**

21 The standard for review by this Court is set forth In *Edlund*
 22 v. *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

23 A district court's order upholding the
 24 Commissioner's denial of benefits is reviewed de novo.
Harman v. Apfel, 211 F.3d 1172, 1174 (9th Cir. 2000).
 25 The decision of the Commissioner may be reversed only if
 26 it is not supported by substantial evidence or if it is
 27 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 1097 (9th Cir. 1999). Substantial evidence is defined as
 28 being more than a mere scintilla, but less than a
 preponderance. *Id.* at 1098. Put another way, substantial
 evidence is such relevant evidence as a reasonable mind

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1 might accept as adequate to support a conclusion.
 2 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
 3 evidence is susceptible to more than one rational
 4 interpretation, the court may not substitute its
 5 judgment for that of the Commissioner. *Tackett*, 180 F.3d
 6 at 1097; *Morgan v. Commissioner*, 169 F.3d 595, 599 (9th
 Cir. 1999).

7 The ALJ is responsible for determining credibility,
 8 resolving conflicts in medical testimony, and resolving
 9 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 Cir. 1995). The ALJ's determinations of law are
 10 reviewed *de novo*, although deference is owed to a
 11 reasonable construction of the applicable statutes.
 12 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

1 Under the Social Security Act, individuals who are
 2 "under a disability" are eligible to receive benefits.
 3 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as
 4 "any medically determinable physical or mental
 5 impairment" which prevents one from engaging "in any
 6 substantial gainful activity" and is expected to result
 7 in death or last "for a continuous period of not less
 8 than 12 months." 42 U.S.C. § 423(d)(1)(A),
 9 1382c(a)(3)(A). Such an impairment must result from
 10 "anatomical, physiological, or psychological
 11 abnormalities which are demonstrable by medically
 12 acceptable clinical and laboratory diagnostic
 13 techniques." 42 U.S.C. § 423(d)(3). The Act also
 14 provides that a claimant will be eligible for benefits
 15 only if his impairments "are of such severity that he is
 16 not only unable to do his previous work but cannot,
 17 considering his age, education and work experience,
 18 engage in any other kind of substantial gainful work
 19 which exists in the national economy...." 42 U.S.C. §
 20 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of
 21 disability consists of both medical and vocational
 22 components.

23 The Commissioner has established a five-step
 24 sequential evaluation process for determining whether a
 25 person is disabled. 20 C.F.R. §§ 404.1520, 416.920;
Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

26 Step 1: Is the claimant engaged in substantial gainful
 27 activities? 20 C.F.R. 404.1520(a)(4)(i), 416.920(a)(4)(i).
 28 If so, benefits are denied. If not, the decision maker
 29 proceeds to step two.

30 Step 2: Does the claimant have a medically severe
 31 impairment or combination of impairments? 20 C.F.R.
 32 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does
 33 not have a severe impairment or combination of impairments,
 34 the disability claim is denied. If the impairment is severe,
 35 the evaluation proceeds to step three.

Step 3: Does the claimant's impairment meet or equal one of the listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity? 20 C.F.R. 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. 404 Subpt. P, App. 1. If the impairment meets or equals a listed impairment, the claimant is conclusively presumed to be disabled. If the impairment does not meet or equal a listed impairment, the evaluation continues to step four.

Step 4: Does the impairment prevent the claimant from performing past relevant work? 20 C.F.R. 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the decision maker determines the claimant's residual functional capacity. If the claimant can perform past relevant work, the claimant is not disabled. If the claimant cannot perform past work, the decision maker continues to step five.

Step 5: Is the claimant able to perform other work in the national economy considering age, education, work experience and residual functional capacity? 20 C.F.R. 404.1520(a)(4)(v), 416.920(a)(4)(v).

The claimant bears the initial burden of proving disability. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)). At step five, the burden shifts to the Commissioner to show that (1) the claimant can perform other substantial gainful activity; and (2) a "significant number of jobs exist in the national economy" which claimant can perform. *Kail v. Heckler*, 722 F. 2d 1496, 1498 (9th Cir. 1984).

ISSUES

The general issue raised is whether there is substantial evidence to support the ALJ's decision to deny benefits and, if so, whether that decision was based on proper legal standards. The issues raised by the parties are: whether the ALJ erred when he evaluated the medical evidence, determined plaintiff's credibility and residual functional capacity, and asked the vocational expert a hypothetical.

ADMINISTRATIVE HEARING

Plaintiff was 44 on the date of the hearing, single, and living alone. (Tr. 22; 330.) Plaintiff completed the eighth grade.

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1 (Id.) He testified that he cannot work because with phlebotomy
 2 treatment he is "just worn out." (Tr. 332.) He had last seen Carol
 3 Hathaway, M.D., three months before the hearing for treatment of
 4 his PCT. (Tr. 333.) He takes care of all of his personal needs,
 5 cooks, reads, takes walks, grocery shops, and drives. (Tr. 333-
 6 35.) Plaintiff can lift 15 to 20 pounds. (Tr. 336.)

7 **ANALYSIS**

8 1. Evaluating medical opinions

9 Plaintiff alleges that the ALJ erred by failing to properly
 10 credit the opinion of treating physician Katherine Griffing, M.D.
 11 (Ct. Rec. 12 at 12.) The Commissioner responds that the ALJ gave
 12 specific and legitimate reasons for discounting some of Dr.
 13 Griffing's opinions. (Ct. Rec. 16 at 8.)

14 The medical opinion of a treating physician is entitled to
 15 greater weight than that of a non-treating physician because the
 16 treating physician is employed to cure and has a greater opportunity
 17 to know and observe the patient as an individual. *Rodriguez v.*
 18 *Bowen*, 876 F. 2d 759, 761 (9th Cir. 1989). "When another doctor's
 19 opinion contradicts the opinion of a treating physician, the
 20 Secretary can disregard the latter only by setting forth 'specific,
 21 legitimate reasons for doing so that are based on substantial
 22 evidence in the record.'" *Ramirez v. Shalala*, 8 F. 3d 1449, 1453 (9th
 23 Cir. 1993) [(quoting *Baxter v. Sullivan*, 923 F. 2d 1391, 1396 (9th
 24 Cir. 1991)]. The opinion of a non-examining physician cannot by
 25 itself constitute substantial evidence that justifies the rejection
 26 of either an examining or a treating physician's opinion. *Lester v.*
 27 *Chater*,, 81 F. 3d 821, 831 (9th Cir. 1995), citing *Pitzer v.*

1 *Sullivan*, 908 F. 2d 502, 506 n. 4 (9th Cir. 1990). The opinion of a
 2 non-examining physician may constitute substantial evidence if it is
 3 supported by and consistent with other evidence. *Andrews v. Shalala*,
 4 53 F. 3d 1035, 1043 (9th Cir. 1995); *Lester*, 81 F. 3d at 830-31.

5 On November 1, 2001, Dr. Griffing diagnosed CPT, impaired hand
 6 mobility secondary to scarring caused by CPT, basal cell carcinoma
 7 on the left cheek and hypertension, possibly caused renally. (Tr.
 8 156.) Dr. Griffing noted, apparently based on Plaintiff's report,
 9 that his skin problem had been present for four years and had not
 10 been treated during that time. (Id.) She stated that Plaintiff had
 11 suffered joint pain, also without having received treatment. (Id.)
 12 Dr. Griffing opined that Plaintiff was severely limited: he was
 13 unable to lift at least 2 pounds or unable to stand and/or walk.
 14 (Tr. 157.) She expected this level of disability to last more than
 15 26 weeks, depending on Plaintiff's response to therapy. (Id.) She
 16 opined that phlebotomy therapy over six months to one year can
 17 reduce symptoms in many patients, as would hepatitis C treatment.
 18 (Id.) She told Plaintiff to begin avoiding the sun. (Tr. 217.)

19 Interestingly, two weeks later, on November 15, 2001, Dr.
 20 Monroe, M.D. performed a consultative examination for DDS. (Tr.
 21 158.) After performing various physical tests, he opined that
 22 Plaintiff showed an RFC for gross movements of his hands, and an RFC
 23 for fine and dexterous movements in his right hand. (Tr. 160.)
 24 Similarly, chart notes from the Spokane Clinic dated January 30,
 25 2002 reveal that Plaintiff's hands were much better and he can bend
 26 fingers of both hands to fists. (Tr. 208).

27 In March of 2002, Jeanette Worley, ARNP, noted that Plaintiff
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1 declined taking tylenol or advil the night of his shots and declined
2 antidepressants after reporting mood swings. (Tr. 186.)

3 On May 3, 2002, Dr. Griffing diagnosed continuing CPT and loss
4 of mobility due to scarring, mild shortness of breath with exertion,
5 fatigue due to interferon treatment for hepatitis C, and
6 hypertension resolved on therapy. (Tr. 180.) Dr. Griffing reported
7 that plaintiff was "able to make [a] fist (with right) hand and
8 extend fingers. Fist with left hand limited by injuries to index and
9 little finger." (Tr. 205.) At this time Dr. Griffing noted in a
10 diagram two nodules on the left hand near the base of the fist and
11 second fingers. (Id.)

12 Dr. Griffing indicated that workplace restrictions included no
13 sunlight, no chemical exposure and that the work could not involve
14 stress to the hands. (Tr. 181.) At that time the doctor opined that
15 plaintiff's ability to be released for work "depends on [his]
16 response to therapy." (Id.) In fact Dr. Griffing suggested that
17 while manual work was not possible, an evaluation "by DVR for [a]
18 special job not requiring hands" might be appropriate. (Id.)

19 START here

20 On June 3, 2002, Ms. Worley noted that, overall, after four
21 months of treatment for hepatitis C, Plaintiff felt that he was
22 doing quite well. (Tr. 183.) He complained of fatigue, inability to
23 concentrate, and memory loss associated with medication. (Id.) Ms.
24 Worley observed that Plaintiff's blisters had dried. (Id.) By June
25 28, 2002, Plaintiff told Ms. Worley he was much improved over the
26 last month or so. (Tr. 188.) On August 12, 2002 chart notes from the
27 Spokane Clinic reveal that Plaintiff has "suntanned skin, including
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1 arms." (Tr. 202.) On August 15, 2002, clinic notes indicate PCT is
 2 stable with no blisters, and in April of 2003, Plaintiff can grip
 3 completely with his right hand. (Tr. 236; 244.)

4 On April 4, 2003, Dr. Griffing reports that plaintiff's hands
 5 have improved compared to 1-2 years ago. (Tr. 244.) On April 18,
 6 2003, Dr. Griffing notes a referral of the plaintiff to DVR for
 7 rehabilitation. (Tr. 246; 250.)

8 The ALJ properly rejected the severity of impairment assessed
 9 by Dr. Griffing because it was inconsistent with the Plaintiff's own
 10 description of his abilities, and with other medical evidence from
 11 treatment providers:

12 " . . . the claimant reported in April 2003 that 'he could do
 13 anything he needed to do with his left hand and denied pain or
 14 other symptoms' which also indicates the claimant is not as
 15 limited in functioning as he has alleged, although again, Dr.
 16 Griffing opined that the claimant continued to be severely
 17 limited due to cutaneous porphyria and fatigue/malaise
 18 secondary to hepatitis C, although liver function tests in
 19 October were improved compared to previous tests despite failed
 20 interferon treatment the year before.

21 For these reasons, the undersigned rejects the opinion of Dr.
 22 Griffing that the claimant was 'severely' limited, as the
 23 statements by the claimant and office notes do not reflect
 24 same."

25 Tr. 25.

26 The ALJ gave specific and legitimate reasons supported by
 27 substantial evidence in the record for discounting the severe
 28 limitations assessed by Dr. Griffing. Accordingly, the ALJ's
 determination must be affirmed.

29 2. Assessing plaintiff's credibility

30 Plaintiff asserts that the ALJ erred when he found Mr. Steele
 31 less than completely credible. (Ct. Rec. 12 at 13.) The Commissioner
 32 responds that the record supports the ALJ's determination. (Ct. Rec.
 33

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1 16 at 12.)

2 In *Thomas v. Barnhart*, 278 F. 3d 947, 958-59 (9th Cir. 2002),
 3 the court noted when the ALJ finds the Plaintiff's testimony as to
 4 the severity of pain and impairments is unreliable, the ALJ must
 5 make a credibility determination with findings sufficiently specific
 6 to permit the court to conclude that the ALJ did not arbitrarily
 7 discredit the Plaintiff's testimony. *Bunnell v. Sullivan*, 947 F. 2d
 8 341, 345-46 (9th Cir. 1991)(en banc). The ALJ may consider the
 9 following factors when weighing the Plaintiff's credibility:
 10 "[plaintiff's] reputation for truthfulness, inconsistencies either
 11 in [plaintiff's] testimony or between [his/her] testimony and
 12 [his/her] conduct, [plaintiff's] daily activities, [his/her] work
 13 record, and testimony from physicians and third parties concerning
 14 the nature, severity, and effect of the symptoms of which
 15 [plaintiff] complains." *Light v. Soc. Sec. Admin.*, 119 F. 3d 789,
 16 792 (9th Cir. 1997). If the ALJ's credibility finding is supported by
 17 substantial evidence in the record, the court may not engage in
 18 second-guessing. See *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F. 3d
 19 595, 600 (9th Cir. 1999).

20 The ALJ found Plaintiff not credible because of inconsistencies
 21 between his statements to medical providers and his testimony at the
 22 hearing, and between his testimony and the medical records. (Tr.
 23 25.) If the ALJ's credibility finding is supported by substantial
 24 evidence in the record, the court may not engage in second-guessing.
 25 See *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F. 3d 595, 600 (9th
 26 Cir. 1999).

27 The ALJ discounts Plaintiff's credibility because his

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1 testimony was inconsistent with statements he made to medical
 2 providers, and with chart notes and other medical records. On July
 3 9, 2002, plaintiff reported to Dr. Griffing that he rolls his own
 4 cigarettes. (Tr. 204.) On April 29, 2003, plaintiff told Donna Mann,
 5 O.T.R., that he felt he "can do everything he needs to do with his
 6 hand." (Tr. 253.) He denied pain and said he didn't think he would
 7 gain from further intervention. (Id.) The ALJ notes:

8 "He testified he has low energy and does no housework or much
 9 of anything. He testified he reads and takes short walks (2 to
 10 3 blocks) and that he could lift 15 to 20 pounds. . . . He
 testified that Interferon treatment made him very ill with hair
 loss and fatigue.

11 The medical evidence reflects that this claimant was first
 12 evaluated on November 1, 2001, for cutaneous porphyria tarda
 13 with impaired left [hand] but by February of 2002 his hands
 were much better and he could bend his fingers of both hands to
 make a fist. . . .

14 Also, although claimant has been advised to avoid sunlight,
 15 office notes dated August 2002 reflects observation that he had
 suntanned skin, including his arms. . . .

16 The claimant reported in April 2003, that 'he could do anything
 17 he needed to do with his left hand and denied pain or other
 18 symptoms' which also indicates the claimant is not as limited
 in functioning as he has alleged"

19 Tr. 25.

20 Substantial evidence in the record supports the ALJ's
 21 credibility determination. Plaintiff told doctors his left hand was
 22 fully functional but testified he could do very little. Doctors
 23 observed that he regained movement in his hands following phlebotomy
 24 treatment. The medical evidence as a whole, as well as plaintiff's
 25 statements to medical providers, is inconsistent with the level of
 26 impairment claimed at the hearing. The record supports the ALJ's
 27 credibility determination.

28 3. Hypothetical to vocational expert

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1 Plaintiff contends that the ALJ gave the vocational expert an
2 incomplete hypothetical. (Ct. Rec. 12 at 13.) The Commissioner
3 answers that the hypothetical included all of plaintiff's
4 limitations which are supported by the medical evidence. (Ct. Rec.
5 16 at 15-16.)

6 When the ALJ's first hypothetical was reduced from a full to a
7 wide range of light work, with environmental and other limitations,
8 the vocational expert opined that such a person could work as an
9 agricultural produce sorter, cannery worker, or cafeteria worker.
10 (Tr. 348.) This was appropriate because plaintiff testified that he
11 could lift 15 to 20 pounds, within the range of light work.

12 Alternatively, the ALJ gave the same limitations but changed
13 the exertion level from light to sedentary. The VE opined that a
14 person with these limitations would be able to work as a sedentary
15 cashier or sewing machine operator. (Tr. 349.) Finally, when the
16 limitation of only occasional fingering and handling with both hands
17 was added, the VE opined that a person with these additional
18 limitations would be able to work as an usher or school bus monitor,
19 although she indicated that the latter was often less than full-time
20 employment. (Tr. 350-51.)

21 The ALJ's hypotheticals included limitations supported by the
22 evidence, such as light work based on Plaintiff's stated lifting
23 ability. There was no error in the ALJ's analysis at step five.

24 **CONCLUSION**

25 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 11) is
26 **DENIED.**

27 2. Defendant's Motion for Summary Judgment (Ct. Rec. 15) is

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1 **GRANTED.**

2 3. Any application for attorney fees may be filed by separate
3 Motion.

4 4. The District Court Executive is directed to file this
5 Order and provide a copy to counsel for Plaintiff and Defendant.
6 Judgment shall be entered for Defendant and the file **CLOSED**.

7 **DATED** this 24th day of June, 2005.

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9 s/ Michael W. Leavitt

10 MICHAEL W. LEAVITT
11 UNITED STATES MAGISTRATE JUDGE

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